

Nguyen (Migration) [2018] AATA 987 (22 March 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs Thi Ngoc Y Nguyen

VISA APPLICANT: Mr Thanh Dung Do

CASE NUMBER: 1613342

DIBP REFERENCE(S): OSF2015/071127

MEMBER: Amanda Mendes Da Costa

DATE: 22 March 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations

- 1.
- 2.
3. Statement made on 22 March 2018 at 1:45pm
- 4.

CATCHWORDS

Migration – Partner (Provisional) (Class UF) – Subclass 309 (Spouse (Provisional)) – Whether applicant is in a genuine spousal relationship with the sponsor – Evidence of pooling of financial resources – Marriage represented to others – Where applicant is seeking a migration outcome – Seeking a migration outcome not necessarily inconsistent with genuine spousal relationship

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2, cls 309.211, 309.221

CASES

Minister of State for Immigration, Local Government and Ethnic Affairs v Dhillon (unreported, Northrop, Wilcox and French JJ, 8 May 1990)

5.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 10 August 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
7. The visa applicant, who is a Vietnamese National, applied for the visa on 12 August 2015 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309. 211 and cl.309.221.
8. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because there was little evidence that the parties' relationship was seen as long term one by either Ms Nguyen or Mr Do. The delegate also gave significant weight to Mr Do's immigration history, which the delegate found illustrated a strong desire to migrate to Australia and demonstrated that the visa applicant was prepared to go to great lengths to achieve that goal.
9. The Tribunal notes that Mr Do entered Australia on a visitor visa on 25 December 2007. That visa expired on 25 March 2008 and he subsequently remained unlawfully in Australia from 25 March 2008 to 11 April 2015 when he returned to Vietnam.
10. The review applicant provided the Tribunal with a copy of the primary decision and seeks review of the delegate's decision.
11. The review applicant appeared before the Tribunal on 8 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant, Mr Do, by telephone from Vietnam together with Ms Nguyen's daughter and friend, and Mr Do's sister-in-law. The hearing was conducted with the assistance of a Vietnamese interpreter.
12. The review applicant was represented in relation to the review by her registered migration agent.
13. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in the present case is whether Mr Do is the spouse of Ms Nguyen pursuant to law.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

15. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an

Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen. The review applicant acquired Australian citizenship by grant on 17 September 2014. A copy of the review applicant's citizenship certificate with that date was provided to the Department and the Tribunal accepts this document as genuine.

16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F (2) (a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

17. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties married at Springvale in Victoria on 4 March 2014. A photocopy of a marriage certificate dated 11 April 2014 was provided to the Tribunal and the Tribunal accepts this document as genuine. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the act as required by s.5F (2) (a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

18. Background

19. The parties met at a coffee shop in Springvale in late 2013. At that stage Ms Nguyen was employed in an Asian grocery store and Mr Do was working in fish shop. They continued to see each other at the coffee shop prior to work each day until early November 2013 when Ms Nguyen invited Mr Do to celebrate her birthday at her home. Ms Nguyen told the Tribunal that she introduced Mr Do to her family on Christmas Day 2013 when he joined their celebration. The couple continued to meet and go on outings together until Mr Do proposed to Ms Nguyen in February 2014. They married in a civil ceremony on 4 March 2014. Their celebration of the marriage was delayed until they had saved sufficient money to pay for the expense of a reception. This was held at a restaurant in Springvale on 3 January 2015, with approximately 50 guests in attendance.
20. The parties lived together at the home of Ms Nguyen's daughter following the civil marriage for approximately 12 months.
21. Mr Do returned to Vietnam on 11 April 2015 after he and Ms Nguyen had consulted a migration agent regarding an application by him for a partner visa. He has remained living in Vietnam since his return to Vietnam.
22. Mr Do's account of the inception and development of their relationship was broadly consistent with that of Ms Nguyen, save that their evidence differed in respect of the division of their wedding guest monies. Ms Nguyen told the Tribunal that after paying for the reception, she gave Mr Do the remainder to take back with him to Vietnam. Mr Do said that after paying the cost of the reception, the balance was used by Ms Nguyen to pay the migration agent they consulted, prior to his return to Vietnam.

23. Evidence of Truong Truc Thao

24. Ms Thao is the review applicant's daughter. She is married with two young children. Ms Thao told the Tribunal that she saw her mother every day when Ms Nguyen visited her home. She said she first met Mr Do in 2014 when he was introduced to her by her mother at a birthday party for Ms Thao's maternal grandmother. She was unable to recall the date but thought it was in early January 2014. When asked by the Tribunal whether the family celebrated Christmas, Ms Thao said that they don't really celebrate the festival, although they give each other gifts. She said they don't celebrate with a Christmas dinner. This evidence was inconsistent with the evidence of Ms Nguyen about the introduction of Mr Do to her family.
25. The inconsistencies in the evidence will be discussed later in this decision.
26. Ms Thao told the Tribunal that she attended the wedding party for her mother and Mr Do in January 2015. The Tribunal notes that she is pictured in one of the photographs of the celebration provided by the parties to the Tribunal. Ms Thao explained that her mother and Mr Do lived with her and her husband for approximately 12 months following their civil marriage. When asked by the Tribunal about the Reason for the couple living with her family, Ms Thao said that she required assistance from her mother in caring for her small children. Ms Thao told the Tribunal that she found Mr Do to be honest, simple and down to earth. She believed her mother loved Mr Do as evidenced by her return to Vietnam in 2016 and 2017 to visit him.

27. Evidence of Hang Le

28. Ms Le told the Tribunal that she was a friend of Ms Nguyen and currently rented her the bungalow where she is living. Ms Le said that Ms Nguyen had discussed her relationship with Mr Do and told her that they were a real couple. She had spoken to Mr Do by telephone during some of his conversations with Ms Nguyen.

29. Evidence of Thi B Ngo

30. Ms Ngo is the wife of the visa applicant's brother. She told the Tribunal that she first met Ms Nguyen in 2014 when Mr Do brought Ms Nguyen to their home for Lunar New Year celebrations. Ms Ngo was present at the wedding celebrations of the parties in January 2015. She said she maintained occasional contact with Ms Nguyen, who had recently visited her home for a meal.

31. *The financial aspects of the relationship*

32. The Tribunal is required to consider all the circumstances of the financial aspects of the relationship.
33. The Tribunal found no evidence of any joint ownership of real estate or other major assets or any joint liabilities. Ms Nguyen is sharing rented accommodation with another woman. Mr Do owns a home in Vietnam but is living in rented accommodation as he has relocated for work purposes. Neither party has any savings or superannuation policies. The Tribunal notes that evidence was provided to the Department of two money transfers from the review applicant to the visa applicant between 1 June 2015 and 6 July 2015. These amounts total AUD\$2100.00. Upon considering this information, the Tribunal is not satisfied that the couple are currently pooling their financial resources. The Tribunal also finds no evidence that either party owes any legal obligation in respect of the other. However, given the constraints of residing in separate countries, the Tribunal finds this understandable.

34. The Tribunal accepts that after their wedding, the parties lived together at the home of the review applicant's daughter and whilst living together did pool their incomes and share household and personal expenses. The Tribunal notes that during the time the parties lived together they operated joint bank account into which their salaries were paid and household expenses were withdrawn.

35. Although the Tribunal accords little weight to the current financial aspects of the relationship, the Tribunal accords significant weight to the pooling of financial resources when the couple lived together from March 2014 to April 2015.

36. *The nature the household*

37. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.

38. The parties have no children together. Ms Nguyen's daughter is married with children and lives independently. Mr Do has two children, neither of whom lives with him. Accordingly, there is no evidence of any joint responsibility for the care and support of any children.

39. The Tribunal received evidence from Ms Nguyen that since Mr Do returned to Vietnam in April 2015, she has visited him on four occasions. On each of these visits the parties have stayed together for a number of weeks. They have otherwise predominately lived apart since Mr Do returned to Vietnam. However, after the couple's wedding in March 2014, they lived together on a daily basis for a little over a year. The parties both worked and otherwise shared household and cooking tasks with each other.

40. Whilst the Tribunal finds little evidence of any joint living arrangements and sharing of the responsibility of housework since Mr Do returned to Vietnam it is satisfied that there is significant evidence of such sharing of responsibilities when the couple lived together in Australia.

41. *The social aspects of the relationship*

42. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.

43. The Tribunal accepts that there is recognition of the parties' relationship by family members and friends. The Tribunal accords significant weight to the evidence of Ms Thao who lived with the couple for 12 months and had the opportunity on a daily basis to observe her mother and Mr Do together. The Tribunal finds Ms Thao to be a credible witness. The parties submitted photographs to the Tribunal which depict them on outings together and also in social settings with friends and relatives. There are also several photographs of the wedding party held in January 2015, including photographs in which Ms Thao and other friends are depicted with the bridal couple. The Tribunal finds these photographs to be genuine reflections of a happy family event.

44. Upon considering the evidence detailed above, the Tribunal accepts that the couple represent themselves to other people as being married to each other and that whilst living together in Australia after their marriage they undertook and planned joint social activities.

The nature of the persons' commitment to each other

45. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see the relationship as a long term one are all aspects to be considered in determining the nature of the person's commitment to each other.
46. Ms Nguyen and Mr Do have maintained their relationship since first meeting in late 2013 and have coped with the difficulties of living separately after spending 12 months living together. Ms Nguyen has demonstrated her commitment to the relationship by visiting her husband on a regular basis (four visits) since his return to Vietnam in April 2015. The Tribunal is satisfied from their evidence that they see their relationship as a long term one and have plans to live together in Australia if Mr Do is granted partner visa.
47. The Tribunal has considered Mr Do's immigration history in Australia. It notes that he arrived in Australia on a visitor visa on 25 December 2007. His visitor visa expired on 25 March 2008 and he subsequently remained unlawfully in the community for a period of eight years from 25 March 2008 to 11 April 2015.
48. The Tribunal asked the parties about this aspect of Mr Do's stay in Australia. Ms Nguyen said her husband told her that he was unlawfully in Australia when he proposed to her. Mr Nguyen confirmed this in his evidence.
49. In his decision, the delegate attached significant weight to the visa applicant's immigration history and concluded that Mr Do had contrived the relationship with Ms Nguyen with the sole purpose of obtaining a visa to return to Australia, after having been unsuccessful in his previous attempts to remain in Australia.

The Tribunal recognises that it is not necessarily inconsistent with a genuine relationship if the applicant has entered into the relationship with a view to obtaining a migration outcome. In *Minister of State for Immigration, Local Government and Ethnic Affairs v Dhillon* (unreported, Northrop, Wilcox and French JJ, 8 May 1990) the Full Federal Court held [at 24-25]:

"... people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. As according to what may be described as 'community expectations'. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided, it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.'

50. These observations emphasise that the relevant time for examination of the question of whether a marriage is genuine is the period over which the genuineness of the relationship must be decided, and that this is the central point of reference. It also indicates that the fact that a relationship may be seen to confer a benefit as to residence entitlement does not of itself mean that the relationship is not genuine.
51. The Tribunal does not condone Mr Do's behaviour in remaining in Australia in remaining unlawfully in the community for a substantial period of time and accepts that his motivation for entering into a relationship with Ms Nguyen may have been partially due to his desire to obtain a visa to live in Australia. However, the Tribunal is satisfied that his relationship with Ms Nguyen has subsequently developed into a genuine and lasting one.
52. The Tribunal recognises that there were some discrepancies in the evidence given at the hearing, notably the evidence of Ms Nguyen and her daughter regarding the introduction of Mr Do to their family and the evidence of the parties regarding their spending of the wedding

gift monies. Although the Tribunal holds some concerns about these matters, on balance it is satisfied that the overall evidence establishes that the parties are in a genuine and continuing relationship and it is not contrived for the purposes of achieving a migration outcome. In coming to this view the tribunal has accorded considerable weight to the evidence of Ms Thao; the fact that the parties lived together for 12 months in Australia after their marriage, and the number of visits that Ms Nguyen has made to Vietnam to spend time with her husband since her returned to that country in April 2015.

53. Considering the circumstances as a whole, the Tribunal is satisfied that when the application was made and at the time of the decision, the review and visa applicants had a mutual commitment to a shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied the parties have lived together and have a shared commitment to a future together, living together and not separately and apart, on a permanent basis.
54. On the basis of the above the Tribunal is satisfied that the requirements of s.5F (2) are met at the time the visa application was made and the time of this decision.
55. Therefore the visa applicant meets cl.309.211 and cl.309.221.
56. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

57. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Amanda Mendes Da Costa
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).